Supreme Court, U.S.
FILED
MAY 21 2001
OFFICE OF THE CLERK

No. 00-1464

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION and
ARIZONA PUBLIC SERVICE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENT GILA RIVER INDIAN COMMUNITY

RODNEY B. LEWIS
Counsel of Record
STEVEN J. W. HEELEY
JOHN T. HESTAND
JAMES D. HILL
RUTH E. KOESTER
TIMOTHY L. PIERSON
Attorneys for Respondent
Gila River Indian Community
5002 North Maricopa Road
Box 5090
Chandler, Arizona 85226
(520) 796-1344

167160

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does a state supreme court decision interpreting long-standing and unique state law warrant United States Supreme Court review?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	v
Supplemental Statutory Provisions Involved In The Case	1
Statement of the Case	2
A. History Of Arizona Water Law	2
B. History Of The General Adjudication Of All Rights To Use Water In The Gila River System And Source	5
Argument	8
There Is No Compelling Reason To Grant Certiorari. Certiorari Should Be Denied.	8
I. The Arizona Supreme Court Decision, In *Gila River IV* (The Opinion Below), Does Not Conflict With Or Reverse Previous Decisions Of The Arizona Supreme Court.	8

Contents

Page

A. The Decision Of The Arizona Supreme Court, Concerning Subflow, Followed Established Arizona Precedent And Was Not Sudden, Unpredictable, Or Retroactive. 8

B. No Rights, Vested Or Otherwise, Have Been Taken From Petitioners. 17

II. The Arizona Supreme Court Has Not Changed Long-Standing Arizona Law Concerning Percolating Underground Water. 19

III. The Language, In *Gila River IV*, Pertaining To Percolating Water Is Dictum And Not Subject To Review By This Court. 23

IV. The Decision Of The Arizona Supreme Court Did Not Constitute A Taking Of Property Without Compensation In Violation Of The Fifth Amendment. 24

A. Petitioners Have No Property To Be Taken. 24

Contents

Page

B. Changing The Interpretation Of State Common Law Does Not Constitute A Taking Of Property In Violation Of The Fifth Amendment. 25

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizona Public Service Company v. Long, 160 Ariz. 429, 773 P.2d 988 (1989) 21, 25

Arizona Water Company v. City of Bisbee, 172 Ariz. 176, 836 P.2d 389 (App. 1992) 21, 25

Baldwin v. New York, 399 U.S. 117, 90 S. Ct. 1914, 26 L. Ed. 2d 446 (1970) 26

Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953) 4

Cherry v. Steiner, 543 F. Supp. 1270 (1982) 22, 23

Cherry v. Steiner, 716 F.2d 687 (1983) 23

Hertz v. Woodman, 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed. 101 (1910) 26

Howard v. Perrin, 8 Ariz. 347, 76 P. 460 (1904) .. 2, 20

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 175 Ariz. 382, 857 P.2d 1236 (1993) ..... *passim*

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 (1999) 6, 14

Cited Authorities

Page

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 198 Ariz. 330, 9 P.3d 1069 (2000) ..... *passim*

In the Matter of the Rights of the Use of the Gila River, 171 Ariz. 230, 830 P.2d 442 (1992) (*Gila River I*) 6, 21, 22

Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169 (1970) 4

Johnson v. Frankell, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997) 17

Maricopa County Municipal Water Conservation District v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931) ..... *passim*

Poulos v. New Hampshire, 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953) 17

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981) 5, 20, 21, 22, 23, 25, 27

Town of Chino Valley v. City of Prescott, 457 U.S. 1101, 102 S. Ct. 2897, 73 L. Ed. 2d 1310 (1982) 5, 21

United States v. Superior Court of Arizona, 144 Ariz. 265, 697 P.2d 658 (1985) 5

Cited Authorities

Page

Wainright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) 17

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) 24

United States Constitution:

Fifth Amendment 22, 24, 25, 27

Fourteenth Amendment 22

Rule:

United States Supreme Court Rule 10 8

Statutory Provisions:

Ariz. Rev. Stat. § 45-141 .....1, 3, 6, 9

Ariz. Rev. Stat. § 45-141(A) 1

Ariz. Rev. Stat. § 45-141(B) 1

Ariz. Rev. Stat. § 45-231 through 245 (repealed 1979) 5

Ariz. Rev. Stat. § 45-251 through 260 5

Ariz. Rev. Stat. § 45-251(7) 1

Cited Authorities

	Page
Ariz. Rev. Stat. § 45-252(A)	1
Ariz. Rev. Stat. § 45-401, *et seq.*	4
Laws of 1919, Chapter 164, § 1	2
Revised Statutes of 1887, §§ 3199 and 3201	2
Revised Statutes of 1928, § 3280	3
Treatises and Other Materials:	
Clesson S. Kinney, *Treatise on the Law of Irrigation and the Water Rights* (2d ed. 1912)	13
John B. Weldon, Jr., *General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow*, 27 Ariz. Law Rev. 709 (1985)	5, 6, 9, 19, 23, 24

SUPPLEMENTAL STATUTORY PROVISIONS INVOLVED IN THE CASE

Arizona Revised Statutes (A.R.S.) §§ 45-141(A) and (B) provides:

> A. The waters of all sources, flowing in streams, canyons, ravines, or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.
>
> B. Beneficial use shall be the basis, measure and limit to the use of water.

A.R.S. § 45-251(7) provides:

> "River system and source" means all water appropriable under 45 § 141 and all water subject to claims based upon federal law.

A.R.S. § 45-252(A) provides:

> One or more water users upon a river system and source, the water rights of which have not been previously adjudicated under this article and administered by the director of water resources, or the state of Arizona upon the request of any state agency other than the department of water resources may file a petition to have determined in a general adjudication the nature, extent and relative priority of the water rights of all persons in the river system and source.

STATEMENT OF THE CASE

A. History Of Arizona Water Law

The State of Arizona has a unique, bifurcated system for allocating the use of water. Surface water is subject to the doctrine of prior appropriation, where the basic rule is "first in time, first in right." Under prior appropriation, junior appropriators are required to give up the use of water, in times of shortage, in favor of senior appropriators (those whose water use began at an earlier point in time). Underground water that is defined as "subflow" is also subject to the doctrine of prior appropriation. However, underground water that is defined as "percolating" is not subject to appropriation, but, rather, is subject to the doctrine of reasonable use. This distinctive system of water use allocation developed through a combination of Arizona statutes and common law.

In 1887, the Arizona Territorial Legislature declared that all rivers, creeks, and streams of running water, as well as lakes and ponds, were public property and subject to appropriation. *See* Revised Statutes of 1887, §§ 3199 and 3201. In *Howard v. Perrin,* 8 Ariz. 347, 353, 76 P. 460, 462 (1904), the Supreme Court of the Territory of Arizona determined that "a running stream flowing in natural channels between well-defined banks" was subject to appropriation under the statutes, but that "filtrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels" was not subject to appropriation.

In 1919, the Legislature of the State of Arizona enacted a Water Code. *See* Laws of 1919, Chapter 164, Section 1. In 1928, this Water Code was amended to read: "The water

of all sources, flowing in streams, canyons, ravines or other natural channels or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water and of lakes, ponds and springs on the surface are public and subject to appropriation." Revised Statutes of 1928, § 3280. This language remains in Arizona's Water Code today, at Arizona Revised Statutes ("A.R.S.") § 45-141.

It was against this backdrop that the Arizona Supreme Court enunciated rules distinguishing between underground water that was subject to the doctrine of prior appropriation (*i.e.*, subflow) and underground water that was not subject to prior appropriation (*i.e.*, percolating). *See Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931) ("*Southwest Cotton*"). In *Southwest Cotton*, the Arizona Supreme Court held that underground water that constitutes a part of the surface stream is appropriable, and defined such water as "subflow." The court also set forth criteria for determining subflow.

> The underflow, subflow, or undercurrent, as it is variously called, of a surface stream may be defined as those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream. 2 Kinney on Irrigation (2d Ed.) par. 1161.
>
> As the names given to this class of waters indicate, physically they constitute a part of the surface stream itself, and are simply incidental thereto, and also in the main depend on the surface stream

> to which they are incident for the greater part of their water supply. The best test which can be applied to determine whether underground waters are as a matter of fact and law part of the stream is that there cannot be any abstraction of the water of the underflow without abstracting a corresponding amount from the surface stream, for the reason that the water from the surface stream must necessarily fill the loose, porous material of its bed to the point of complete saturation before there can be any surface flow.

Southwest Cotton, 39 Ariz. at 96, 4 P.2d at 380.

Groundwater that did not constitute "subflow" was defined as "percolating," and was not subject to appropriation. The Arizona Supreme Court did not, at that time, determine the rules governing use of non-appropriable "percolating water." Later Arizona Supreme Court decisions determined that "percolating" underground water was subject to the doctrine of beneficial use, and that a landowner could withdraw percolating water from beneath his own land, for beneficial use on his own land, without incurring damage for depleting the percolating water supply of his neighbor. *See Jarvis v. State Land Department*, 106 Ariz. 506, 479 P.2d 169 (1970); *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953).

The Arizona Legislature recognized that water users in the state were "mining" groundwater at a rate far exceeding its natural recharge and, beginning in 1948, enacted a series of laws that culminated, in 1980, in the adoption of the Arizona Groundwater Management Act. A.R.S. § 45-401, *et seq*. This Act established critical groundwater management areas, and placed restrictions on the pumping and use of percolating

groundwater in these critical management areas. In *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) (*"Chino Valley II"*), the Arizona Supreme Court rejected allegations that the Groundwater Management Act impermissibly took property of landowners, whose land was over percolating water sources, without compensation. The Arizona Supreme Court determined that, under Arizona law, there was no private ownership of seeping or percolating water until it was reduced to actual possession and control. 131 Ariz. at 82, 638 P.2d at 1328.

B. History Of The General Adjudication Of All Rights To Use Water In The Gila River System And Source

In 1919, the Arizona Legislature adopted a procedure, conducted before the Arizona State Land Department, for the determination of conflicting water rights. *See* A.R.S. §§ 45-231 through 45-245 (repealed in 1979). Between 1974 and 1978, the Salt River Valley Water Users' Association and Phelps Dodge Corporation filed petitions to determine conflicting rights to use water in the Salt River above Granite Reef Dam, for the Verde River and its tributaries, for the Gila River, and for the Little Colorado River. *See General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow*, 27 Arizona Law Rev. 709 (1985). In 1979, the Arizona Legislature repealed the administrative procedure and replaced it with the General Adjudication of Water Rights statutes (A.R.S §§ 45-251 to 45-260). *See United States v. Superior Court of Arizona*, 144 Ariz. 265, 271, 697 P.2d 658, 664 (1985).

Thereafter, adjudication of all water rights in the Salt, Verde, Gila, Agua Fria, Upper Santa Cruz, and San Pedro River watersheds was consolidated into one general adjudication entitled *In re the General Adjudication of All Rights to Use*

Water in the Gila River System and Source ("*General Adjudication*"). After consolidation, the Superior Court identified certain legal issues the court would resolve before proceeding to its adjudication of individual claims. *See In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 233, 830 P.2d 442, 445 (1992) ("*Gila River I*").

In October of 1987, the trial court conducted five days of hearings on the relationship between surface water and groundwater. Following the hearings, a motion was filed to exclude from the adjudication all wells pumping percolating groundwater — leaving only those wells pumping surface flow and subflow within the meaning of *Southwest Cotton*. The trial court enunciated a test (the "50%/90 day rule") under which groundwater was considered to be subflow if, during a period of 90 days of continuous pumping, the stream depletion reached 50% or more of the amount of water pumped. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 384-386, 857 P.2d 1236, 1238-1240 (1993) ("*Gila River II*").

Six legal issues, arising out of the *General Adjudication*, were accepted for Interlocutory Appeal by the Arizona Supreme Court. One of the questions for review was: Did the trial court err in adopting its 50%/90 day test for determining whether underground water is "appropriable" under A.R.S. § 45-141? *See* Interlocutory Issue 2, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 414, 989 P.2d 739, 742 (1999) ("*Gila River III*").

While the court in *Gila River II* agreed that "subflow," as the term was used in *Southwest Cotton*, was appropriable water and subject to the jurisdiction of the *General Adjudication*, it also determined that the trial court's 50%/90 day rule did not meet the *Southwest Cotton* subflow criteria. The Arizona

Supreme Court vacated the portion of the trial court's order that formulated the 50%/90 day rule — remanding the matter to the trial judge to take evidence and, by applying the principles contained in *Gila River II*, determine criteria for distinguishing appropriable subflow from percolating groundwater. 175 Ariz. at 394, 857 P.2d at 1248.

Following remand, a trial was conducted to determine the criteria for separating appropriable subflow from percolating water. The Arizona Supreme Court reviewed the trial court's determination of fact and law, and concluded:

> We affirm the trial court's order after remand in all respects. The subflow zone is defined as the saturated floodplain Holocene alluvium. DWR, in turn, will determine the specific parameters of that zone in a particular area by evaluating all of the applicable and measurable criteria set forth in the trial court's order and any other relevant factors. *See* §§ 33-35, *supra*. All wells located within the lateral limits of the subflow zone are subject to this adjudication. In addition, all wells located outside the subflow zone that are pumping water from a stream or its subflow, as determined by DWR's analysis of the well's cone of depression, are included in this adjudication. Finally, wells that, though pumping subflow, have a de minimus effect on the river system may be excluded from the adjudication based on rational guidelines for such an exclusion, as proposed by DWR and adopted by the trial court.

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 198 Ariz. 330, 344, 9 P.3d 1069, 1083 (2000) (*"Gila River IV"*).

ARGUMENT

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI. CERTIORARI SHOULD BE DENIED.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court of the United States. There are no compelling reasons for the Court to grant this Petition.

I. THE ARIZONA SUPREME COURT DECISION, IN *GILA RIVER IV* (THE OPINION BELOW), DOES NOT CONFLICT WITH OR REVERSE PREVIOUS DECISIONS OF THE ARIZONA SUPREME COURT.

Petitioners claim that "[t]he Opinion Below, by unpredictably expanding the definition of subflow, takes property from landowners who relied on the formerly narrow definition when deciding where to locate and invest in wells." Petition, page 11. Petitioners are factually and legally incorrect. In *Gila River IV*, the Arizona Supreme Court did not expand the definition of subflow and did not take property from any landowners.

A. The Decision Of The Arizona Supreme Court, Concerning Subflow, Followed Established Arizona Precedent And Was Not Sudden, Unpredictable, Or Retroactive.

The lynchpin of Petitioners' arguments is that the Arizona Supreme Court's criteria for determining whether underground waters constitute subflow, as enunciated in *Gila River IV*, "constitutes a sudden and unpredictable departure from all prior judicial precedents." Petition, page 13.

Since the 1931 *Southwest Cotton* decision, subflow has legally been considered to be part of the surface stream and subject to the doctrine of prior appropriation. The Arizona Supreme Court recognized that it must determine "the extent to which water pumped from wells must be treated as appropriable under § 45-141 or, conversely, as groundwater excluded from the legal rules applying to prior appropriation." *Gila River II*, 175 Ariz. at 386, 857 P.2d at 1240.

Throughout the various interlocutory appeals of the *General Adjudication*, the Arizona Supreme Court has consistently stated that it would only interpret the requirements of *Southwest Cotton*, and that it was not going to change or expand the definition of subflow. In *Gila River IV*, the court discussed its decision in *Gila River II*, stating: "In so holding, we reaffirmed the principles set forth in *Southwest Cotton,* noting that our role was to interpret, not to expand or in any way change, the holdings in that case." 198 Ariz. at 335, 9 P.3d at 1074.

Petitioners argue that, in *Gila River IV*, the Arizona Supreme Court failed to follow the same criteria for determining subflow as were used in *Southwest Cotton*. To support their contention, Petitioners pick and choose selected words from *Southwest Cotton* and subsequent decisions, and completely ignore the criteria for determining subflow that were set out in *Southwest Cotton* and followed in *Gila River IV*.

> The underflow, subflow, or undercurrent, as it is variously called, of a surface stream may be defined as those waters which slowly find their

> way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream. 2 Kinney on Irrigation (2d Ed.) par. 1161.
>
> As the names given to this class of waters indicate, physically they constitute a part of the surface stream itself, and are simply incidental thereto, and also in the main depend on the surface stream to which they are incident for the greater part of their water supply. The best test which can be applied to determine whether underground waters are as a matter of fact and law part of the stream is that there cannot be any abstraction of the water of the underflow without abstracting a corresponding amount from the surface stream, for the reason that the water from the surface stream must necessarily fill the loose, porous material of its bed to the point of complete saturation before there can be any surface flow.

Southwest Cotton, 39 Ariz. at 96, 4 P.2d at 380.

The *Southwest Cotton* court explained some of the evidentiary elements that could be used in determining whether underground water was appropriable subflow or non-appropriable percolating water — a series of wells or borings, tunnels, the color and character of the water, the sound of water passing underneath the earth, the interruption of the flowing of other wells on the line of the alleged subterranean stream, geologic formation, and others.

39 Ariz. at 87, 4 P.2d at 377. In *Gila River IV*, the Arizona Supreme Court reiterated the *Southwest Cotton* criteria:

> The court articulated the following test for determining whether a well is pumping subflow: Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream? If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself. . . .

198 Ariz. at 335, 9 P.3d at 1074.

The *Gila River IV* court then explained: "Although 'subflow' is a purely legal, not scientific, term, defining its boundaries is not only difficult at best but also turns ultimately on resolution of factual questions." 198 Ariz. at 337, 9 P.3d at 1076. The Arizona Supreme Court noted that, in *Gila River II*, it had rejected the trial court's 50%/90 day rule as arbitrary and set forth some of the evidentiary elements that might be useful in determining, as a matter of fact and law, what underground water constituted subflow. These included "such characteristics as elevation, gradient, and perhaps chemical makeup" of the surface stream and underground water. 198 Ariz. at 341, 9 P.3d at 1080. In addition, "[f]low direction can be an indicator. If the water flows in the same general direction as the stream, it is more likely related to the stream." *Gila River II*, 175 Ariz. at 392, 857 P.2d at 1246.

After the remand from *Gila River II*, the trial court conducted an extensive ten-day evidentiary hearing, during which ten experts in the fields of geology and hydrology

testified. The court also spent two days traveling almost 600 miles in the San Pedro River basin. At each of the thirteen sites visited, each expert was allowed to explain the geology and hydrology of the site. Four months after the field trip, the trial court held a two-day supplemental evidentiary hearing. 198 Ariz. at 336, 9 P.3d at 1075.

The Arizona Supreme Court noted that the trial court order and findings of fact were comprehensive and detailed, being sixty-six pages long, with thirty-six additional pages of exhibits. The record included not only transcripts of the evidentiary hearings, but also numerous reports, drawings, charts, and other exhibits. *Gila River IV*, 198 Ariz. at 336, 9 P.3d at 1075. The *Gila River IV* court observed that the trial court defined "subflow" as the "saturated floodplain Holocene alluvium" because " '[t]he weight of the evidence' pointed to that geological unit 'as the most credible "subflow" zone.' " 198 Ariz. at 334, 9 P.3d at 1073. The court found "that the record reasonably supports that central finding as well as the trial court's related findings" and concluded that "the trial court's ruling is not invalidated by this court's prior decisions relating to subflow" and that "the ruling comports with hydrological reality as it is currently understood." 198 Ariz. at 334, 9 P.3d at 1073. For these reasons, the Arizona Supreme Court affirmed the trial court's order in its entirety.

Petitioners had argued to the trial court that the subflow zone should be the post-1880 entrenchment (the channel that the San Pedro River took following a major flood in the 1880s). The trial court rejected this factual claim as not being supported by the evidence; and both the trial court and the Arizona Supreme Court noted that the post-1880 entrenchment did not meet the criteria for subflow. *Gila River IV*, 198 Ariz. at 339, 9 P.3d at 1078.

Having failed to convince the trial court and the Arizona Supreme Court that their proposed post-1880 entrenchment was more appropriate as a subflow zone than the saturated floodplain Holocene alluvium, Petitioners now attempt to argue that, in *Gila River IV*, the Arizona Supreme Court failed to follow the same criteria for determination of subflow as were used in *Southwest Cotton*. The determination of whether underground water constitutes subflow involves matters of fact and law. *See Southwest Cotton*, 39 Ariz. at 96, 4 P.2d at 380; *Gila River II*, 175 Ariz. at 388, 857 P.2d at 1242; and *Gila River IV*, 198 Ariz. at 341, 9 P.3d at 1080. Petitioners merely disagree with the factual determination made by the trial court, after a ten-day hearing, and the legal determination of the Arizona Supreme Court that the trial court properly applied unique Arizona state law in its interpretation of the facts. Petitioners are asking this Court to accept certiorari for the purpose of deciding whether the Arizona Supreme Court correctly interpreted its own court-created doctrine, and to decide whether the facts presented in the evidentiary hearing more appropriately supported their claimed subflow zone than it did the subflow zone established by the trial court and approved by the Arizona Supreme Court.

Petitioners argue that subflow is a "narrow concept" and then allege, without basis, that this "narrow concept" mandates a narrow geographic expanse. A computer search, however, reveals that the word "narrow" does not appear in the *Southwest Cotton* decision, either in terms of the breadth of the subflow doctrine or the possible geographic width of the subflow zone. Indeed, the *Southwest Cotton* court relied heavily on Clesson S. Kinney's *Treatise on the Law of Irrigation and Water Rights* (2d ed. 1912) which, at § 1161, pages 2106-2107, defined subflow as "the broad and deep subterranean volume of water which slowly flows through the sand and gravel underlying

most, if not all, of the streams which traverse the country adjacent to the mountain systems of the arid region." *Gila River IV*, 198 Ariz. at 334, 9 P.3d at 1073.

The Arizona Supreme Court, in analyzing the trial court's 50%/90 day rule, determined that this rule was too broad and exceeded the criteria for subflow set out in *Southwest Cotton*. In particular, the court rejected the rule's emphasis on the percentage of water depleted by pumping over a specified period of time, rather than focusing on whether the water being pumped tends to diminish appreciably and directly the flow of the surface stream. *Gila River II*, 175 Ariz. at 393, 857 P.2d at 1247. In addition, the court rejected the 50%/90 day rule because it would identify the underground water of tributaries as subflow, in violation of the *Southwest Cotton* definition of subflow. *Gila River II*, 175 Ariz. at 392, 857 P.2d at 1246.

Thus, by rejecting the too-broad 50%/90 day rule adopted by the trial court, the Arizona Supreme Court reaffirmed "Southwest Cotton's narrow concept of subflow" in *Gila River II*. 175 Ariz. at 393, 857 P.2d at 1247. In *Gila River III*, the Arizona Supreme Court again explained that the "narrow concept" of subflow "turns on whether the well is pumping water that is more closely associated with the stream than with the surrounding alluvium." *Gila River III*, 195 Ariz. at 416, 989 P.2d at 744 (citing *Gila River II*).

In *Gila River IV*, the Arizona Supreme Court specifically considered and rejected Petitioners' argument that the saturated floodplain Holocene alluvium violated the "narrow concept" of *Southwest Cotton*, as discussed only seven years earlier in *Gila River II*. The court wrote:

> As the groundwater users correctly observe, this court "adopted [Kinney's] narrow definition

> [of subflow] in *Southwest Cotton*," *Gila River II*, 175 Ariz. at 390, 858 P.2d at 1244, and again characterized subflow as "a narrow concept" in *Gila River II*. *Id.* at 391, 857 P.2d at 1245. Although those abstract, general statements hold true, we also observed in *Gila River II* that variations may affect where the line is drawn between subflow and nonappropriable percolating water, "depending on the volume of stream flow and other variables." *Id.* Thus, defining subflow in any particular area is a relative endeavor, "not an all-or-nothing proposition." *Id.* And, although "the line between surface and groundwater . . . is, to some extent, artificial and fluid," *id.* at 392, 857 P.2d at 1246, our various descriptions of subflow in *Gila River II* and *Southwest Cotton* should not serve as a straitjacket that restricts us from reaching in the direction of the facts and, so far as possible under those decisions, conforming to hydrological reality.

Gila River IV, 198 Ariz. at 340, 9 P.3d at 1079.

The Arizona Supreme Court also specifically rejected Petitioners' contention that a "narrow concept" would necessitate a subflow zone of only a few feet.

> The resolution of this case should not hinge on the semantics used in either *Gila River II* or *Southwest Cotton* to generally describe subflow. *In short, those decisions were not intended to establish hard and fast, artificial parameters for subflow based solely on its geographic reach or on some arbitrary distance from a streambed. . . .*

> Rather, as we stated in *Gila River II*, the determination of whether a particular well is pumping subflow depends on "whether the well is pumping water that is more closely associated with the stream than with the surrounding alluvium," 175 Ariz. at 392, 857 P.2d at 1246, and whether " 'drawing off the subsurface water tend[s] to diminish appreciably and directly the flow of the surface stream.' " *Id.* at 393, 857 P.2d at 1247, quoting *Southwest Cotton*, 39 Ariz. at 97, 4 P.2d at 380. That determination, in turn, necessitates a comparative evaluation of such factors as "elevation, gradient, [flow direction,] and perhaps chemical makeup." *Gila River II*, 175 Ariz. at 392, 857 P.2d at 1246. [Emphasis added.]

Gila River IV, 198 Ariz. at 341, 9 P.3d at 1080.

Petitioners argued before the Arizona Supreme Court, in *Gila River IV*, that the "narrow concept" of subflow mandated a subflow zone of only a few feet and that the saturated floodplain Holocene alluvium did not, as a matter of fact and law, fulfill the criteria of subflow. The Arizona Supreme Court clearly and definitely told the Petitioners that they were wrong, as a matter of fact and Arizona law. Petitioners now argue to this Court that, in *Gila River IV*, the Arizona Supreme Court misinterpreted unique Arizona law and misapplied the facts. They request this Court to tell the Arizona Supreme Court it incorrectly interpreted two of its own decisions, *Gila River II* and *Southwest Cotton*.

This Court has repeatedly held that "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is

immune from review in the federal courts." *Wainright v. Sykes*, 433 U.S. 72, 82, 97 S. Ct. 2497, 2503, 53 L. Ed. 2d 594 (1977). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Frankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1804, 138 L. Ed. 2d 108 (1997). The Arizona Supreme Court has interpreted Arizona statutes as providing that groundwater in the saturated floodplain Holocene alluvium is presumptively subflow and subject to the jurisdiction of a general adjudication of water rights. Such "state interpretation is as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953).

In *Gila River IV*, the Arizona Supreme Court determined that its decision involved the same definition of subflow as the court had been using for the past seventy years. 198 Ariz. at 334, 9 P.3d at 1073. The court specifically determined that its *Gila River IV* decision was in accordance with the legal principles set out in *Gila River II* (in 1993) and in *Southwest Cotton* (in 1931). There clearly has been no change in Arizona law, sudden or otherwise, and this Petition for Writ of Certiorari should be denied.

B. No Rights, Vested Or Otherwise, Have Been Taken From Petitioners.

The decision in *Gila River IV* did not take any rights, property or otherwise, from any water user in the State of Arizona. Under Arizona law, water is either appropriable or it is not. Surface water, and its corresponding underground subflow, is appropriable. Percolating groundwater is not appropriable. This has been the law in Arizona since 1931.

Gila River IV did not change this law. If underground water is subflow, under both *Southwest Cotton* and *Gila River IV* it is appropriable. If it is appropriable, its use is subject to the jurisdiction of Arizona courts in general stream adjudications. All *Gila River IV* did was to clarify criteria by which the factual and legal determination of subflow can be rendered.

The Arizona Supreme Court was quite aware that its opinion was not altering any rights or changing the status of any water. In *Gila River IV*, the court wrote:

> [T]he trial court did not change existing law concerning subflow or otherwise improperly encroach on the state's Groundwater Code, A.R.S. §§ 45-401 through 45-704. Rather, the court merely applied the criteria set forth in *Gila River II* to the evidence presented on remand. As SRP correctly notes, the trial court's order "addresses only appropriable water and wells that pump such water," without "chang[ing] the legal status of underground water that is not appropriable."

Gila River IV, 198 Ariz. at 344, 9 P.3d at 1083.

Before *Gila River IV*, subflow was appropriable. After *Gila River IV*, subflow was appropriable. The determination whether particular underground water is subflow is a question of fact, to be determined in accordance with the criteria set out in *Southwest Cotton*, *Gila River II*, and *Gila River IV*. Petitioners attempt to give the impression that, if a well is determined to be pumping subflow, the well owner will be prohibited from ever utilizing water from that well. This is false. *Gila River IV* does not hold that parties may not use

subflow water. Rather, the decision holds that subflow is appropriable, and that its nature, extent, and relative priority must be established in a general stream adjudication. Whether water is surface water or subflow, it is part of the stream — and any right to use it is based on the relative priority of the use and the amount of water available.

Gila River IV did not take rights away from any water user. All it did was confirm that those water users pumping subflow were still active parties in the *General Adjudication*.

II. THE ARIZONA SUPREME COURT HAS NOT CHANGED LONG-STANDING ARIZONA LAW CONCERNING PERCOLATING UNDERGROUND WATER.

Just as the decision in *Gila River IV* did not change the definition of subflow, and did not take any rights away from any water user in Arizona, the decision did not change the definition of percolating groundwater or change the legal status of percolating groundwater.

Petitioners take exception to this language in *Gila River IV*:

> Moreover, because a well owner does not own underground water, *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981), and because landowners have "no legally recognized property right in potential, future groundwater use," *Gila River I*, 171 Ariz. at 239, 830 P.2d at 451, the constitutional argument is substantively without merit.

198 Ariz. at 344, 9 P.3d at 1083. However, this language is actually an accurate statement of long-standing Arizona

statutory and common law. In 1981, in *Chino Valley II*, the Arizona Supreme Court unambiguously stated that, under Arizona law, there was no right to ownership of groundwater. The court considered previous Arizona decisions containing statements indicating that the owner of the overlying land owned the percolating groundwater under that land. The court considered the issues, language, and decisions in *Howard v. Perrin* and *Southwest Cotton*, and determined that any statements concerning ownership of groundwater or percolating groundwater were dicta and irrelevant to the resolution of the issues in these cases. The court declared:

> *Dictum thrice repeated is still dictum.* It is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. [Citation omitted.] It is not controlling as precedent. [Citation omitted.] *We therefore hold that the statement first made in Howard v. Perrin* and reiterated under circumstances where the exact nature of the overlying owner's rights to the water beneath his property were not in question *is not precedent for the decision in this case.* [Emphasis added.]

Chino Valley II, 131 Ariz. at 81, 638 P.2d at 1327.

In *Chino Valley II*, appellants claimed that the Arizona Groundwater Management Act denied them due process of law and just compensation. The question, the Arizona Supreme Court determined, was: "[W]hat are a landowner's rights in the water percolating under his lands?" 131 Ariz. at 82, 638 P.2d at 1328. The court answered: "In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control

by the person claiming them because of their migratory character. Like wild animals free to roam as they please, they are the property of no one." 131 Ariz. at 82, 638 P.2d at 1328. The court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." 131 Ariz. at 82, 638 P.2d at 1328. The decision was appealed to this Court, where it was "dismissed for want of a substantial federal question." *Town of Chino Valley v. City of Prescott*, 457 U.S. 1101, 102 S. Ct. 2897, 2898, 73 L. Ed. 2d 1310 (1982).

Arizona appellate courts have, over the last twenty years, consistently and unequivocally held that one does not own groundwater in Arizona. In *Arizona Public Service Company v. Long*, 160 Ariz. 429, 436, 773 P.2d 988, 995 (1989), the Arizona Supreme Court stated: "One does not own water in Arizona. One only has the right to put it to beneficial use. This applies to both surface water [citation omitted] and groundwater [citation omitted]." *See also Arizona Water Company v. City of Bisbee*, 172 Ariz. 176, 179, 836 P.2d 389, 392 (App. 1992).

The Arizona Supreme Court examined the issue of ownership of percolating groundwater in *Gila River I*. Therein, the court declared that, under Arizona law, there is no ownership of water, surface or underground, and that water rights are based on current beneficial use — with no party having a right to future potential water use. The court stated:

> Arizona law recognized no right to reserve water for some potential future use. *See* John D. Leshy

> & James Belanger, *Arizona Law Where Ground and Surface Water Meet,* 20 Ariz. St. L.J. 657, 698 (1988). Those wishing to contest that general principle were not asserting a right to property; Arizona law recognized no such property right. *See id.; Town of Chino Valley v. City of Prescott,* 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981). * * * Having no legally recognized property right in potential, future groundwater use, they have no due process rights of which they can be deprived by the summons or the instructions which accompanied it.

171 Ariz. at 239, 830 P.2d at 451.

Federal courts have acknowledged that, under Arizona law, there are no property rights to percolating groundwater. In *Cherry v. Steiner*, 543 F. Supp. 1270 (1982) ("*Cherry I*"), the District Court considered whether the Arizona Groundwater Management Act violated the Fifth and Fourteenth Amendments. After observing that federal courts look to state law for the definition of property rights, the District Court wrote: "The only interpretation of Arizona law open to this Court is that a landowner has no interest in underlying groundwater prior to its capture. Without an interest in the percolating water, the plaintiffs may not assert a wrongful taking of their property; *Chino Valley II* emasculates their due process argument." 543 F. Supp. at 1277.

For almost twenty years, groundwater users have been claiming that the inability to own percolating groundwater is an unpredictable change in Arizona law, giving rise to a federal question as to whether property has been

impermissibly taken without due process. However, in *Cherry I*, the District Court recognized that *Chino Valley II* did not constitute an unpredictable or sudden change in Arizona law concerning ownership of percolating water. 543 F. Supp. at 1277-1278. The Ninth Circuit upheld the District Court's decision, agreeing that the determination, that there was no ownership of percolating groundwater under Arizona law, "was not a 'startling' and 'unpredictable' change in Arizona property law, if it represents any change at all." *Cherry v. Steiner*, 716 F.2d 687, 692 (1983) ("*Cherry II*"). A statement of law that did not constitute a sudden or unpredictable change in 1982 could hardly be a sudden or unpredictable change in 2000. Thus, *Gila River IV* did not represent a sudden or unpredictable change in Arizona law concerning either subflow or percolating water.

III. THE LANGUAGE, IN *GILA RIVER IV*, PERTAINING TO PERCOLATING WATER IS DICTUM AND NOT SUBJECT TO REVIEW BY THIS COURT.

Petitioners complain about the language in *Gila River IV* stating that "landowners have 'no legally recognized property right in potential, future groundwater use.' " 198 Ariz. at 344, 9 P.3d at 1083. While that language is a correct, long-standing statement of Arizona water law, it is also dictum in *Gila River IV*. Dictum "is a court's statement on a question not necessarily involved in the case and, hence, is without force of adjudication. [Citation omitted.] It is not controlling as precedent." *Chino Valley II*, 131 Ariz. at 81, 638 P.2d at 1327.

The *General Adjudication* only has jurisdiction to determine the nature, extent, and priority of water uses that

are subject to prior appropriation. Percolating groundwater is not subject to prior appropriation, and percolating water uses cannot be affected in the *General Adjudication*. Thus, any language in *Gila River IV* dealing with percolating water is not necessary to the decision. The United States Supreme Court should not accept certiorari for the purpose of reviewing dictum of a state supreme court.

IV. THE DECISION OF THE ARIZONA SUPREME COURT DID NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT.

Gila River IV did not represent a change in the seventy-year-old doctrine of subflow; nor did it represent a change in the twenty-year-old determination that there are no ownership rights to percolating groundwater. However, even if *Gila River IV* had constituted a sudden and unpredictable change in the law, a decision by a state supreme court to revise or update state common law would not constitute a taking of private property under the Fifth Amendment.

A. Petitioners Have No Property To Be Taken.

Petitioners allege that *Gila River IV* violates the Fifth Amendment by taking private property for public use, without compensation. Basic to any claim for compensation under the Fifth Amendment is ownership of the property that is allegedly taken. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law. . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 451, 66 L. Ed. 2d 358 (1980). Under

Arizona law, no party owns water, surface or underground. *Chino Valley II*; *Arizona Public Service Company v. Long*; *Arizona Water Company v. City of Bisbee*; and *Gila River I*. Since the Petitioners do not have property that can be taken, there can be no violation of the Fifth Amendment.

B. Changing The Interpretation Of State Common Law Does Not Constitute A Taking Of Property In Violation Of The Fifth Amendment.

Petitioners do not cite a single case, from any state or federal court, holding that a state supreme court's altering its interpretation of state common law constituted a taking of property, without compensation, in violation of the Fifth Amendment to the United States Constitution. A supreme court, whether this Court or a state supreme court, must retain the flexibility to make changes in its common law.

The Arizona Supreme Court has long recognized its ability and obligation to adjust its common law when necessity arises. In *Southwest Cotton*, the court observed:

> It is true that the common law is not in its nature and character an absolute, fixed, and inflexible system; it is rather a system of general juridical truths, founded on reason, natural justice, and enlightened public policy, which are conditionally explained with the progress of society, and which adapt themselves to the gradual changes of that society and the conditions, exigencies, and usages of the country. It is never entirely stationary, but is modified and extended by analogous construction and custom so as to embrace new relations springing up from time to time from an

> amelioration or change of society, or different physical conditions arising in the countries to which it is to be applied. Should it ever become so crystallized that its expressions must take the same form, irrespective of physical, social, or other conditions, peculiar to the locality or the character and habits of the people, it would cease to be the common law, and become a rigid and arbitrary code.

39 Ariz. at 81-82, 4 P.2d at 375. Thus, the very decision that created the subflow doctrine gave warning that common law could change, if change was needed.

This Court has also recognized that courts must be free to change common law. "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Hertz v. Woodman*, 218 U.S. 205, 212, 30 S. Ct. 621, 622, 54 L. Ed. 101 (1910). In his dissenting and concurring opinion in *Baldwin v. New York*, 399 U.S. 117, 128, 90 S. Ct. 1914, 1920, 26 L. Ed. 2d 446 (1970), Justice Harlan explained:

> Woodenly applied, however, [*stare decisis*] builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings — old or recent — or reconsidered settled dicta where the principles announced prove

> either practically [citations omitted] or jurisprudentially [cited omitted] unworkable, or no longer suited to contemporary life [citation omitted].

Pervasive changes in states' water laws have taken place over the last century, without creating any Fifth Amendment taking. In rejecting claims that a taking occurred because of the adoption of the Arizona Groundwater Management Act, the Arizona Supreme Court observed:

> Legislatures of various states have from time to time abolished the prevailing uses of groundwater and substituted other plans for its use. State courts have uniformly rejected the idea that groundwater percolating through the soil may not be limited and regulated and must be acquired by eminent domain. Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla.), cert. denied, 444 U.S. 965, 100 S.Ct. 453, 62 L.Ed.2d 377 (1979); Williams v. Wichita, 190 Kan. 317, 340-41, 374 P.2d 578, 595-96 (1962), cert. denied, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed.2d 38 (1963); Crookston Cattle Co. v. Minnesota Department of Natural Resources, 300 N.W.2d 769, 774 (Minn.1980); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D.1968); Knight v. Grimes, 80 S.D. 517, 523-27, 127 N.W.2d 708, 711-14 (1964).

Chino Valley II, 131 Ariz. at 83-84, 638 P.2d at 1329-1330.

A state supreme court's revision, or even reversal, of state common law does not constitute a taking of property without compensation, in violation of the Fifth Amendment.

CONCLUSION

There are no compelling reasons that would justify granting the Petition for Writ of Certiorari herein. Therefore, the Gila River Indian Community respectfully requests that the Court deny this Petition.

Respectfully submitted,

RODNEY B. LEWIS
Counsel of Record
STEVEN J. W. HEELEY
JOHN T. HESTAND
JAMES D. HILL
RUTH E. KOESTER
TIMOTHY L. PIERSON
Attorneys for Respondent
Gila River Indian Community
5002 North Maricopa Road
Box 5090
Chandler, Arizona 85226
(520) 796-1344